Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

v.

ROBERT JOHNSEN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. L'ESPERANCE
Counsel for Petitioner
609 Richmond Drive, S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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QUESTION PRESENTED

Is SAFETY the primary focus of the exemption provisions of 29 U.S.C. Section 213(b)(1), of the Fair Labor Standards Act, such that employee was a truck driver engaged in interstate commerce and therefore subject to the jurisdiction of the Secretary of Transportation under the Motor Carrier Act, 29 U.S.C. Section 3102-3104?

PARTIES TO THE PROCEEDING

ALLSUP'S CONVENIENCE STORES, INC.
P.O. Box 1907
Clovis, New Mexico 88102-1907

(There are no parent or subsidiary companies to be listed.)

ROBERT JOHNSEN

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No. 94-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

PETITIONER,

VS.

ROBERT JOHNSEN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF

THE STATE OF NEW MEXICO

COMES NOW appellate counsel for Allsup's Convenience Stores Inc., Defendant-Appellee-Petitioner herein, and petitions for a Writ of Certiorari to review the decision of the courts of the State of New Mexico regarding the application of an exemption to the Fair Labor Standards Act, specifically 29 U.S.C. Section 213(b)(1).

OPINION BELOW

An Opinion was filed in this case October 28, 1994, in the New Mexico Court of Appeals; a timely Motion for Rehearing was filed by Allsup's and, in turn, denied December 16, 1994. A Petition for Writ Certiorari was denied by the New Mexico Supreme Court on January 25, 1995.

The above Opinion and Orders are reprinted in full as Appendix A hereto. Said Opinion is published as: Johnsen v. Allsup's Convenience Stores, Inc., _____ N.M. _____, 889 P.2d 853 (Ct. App. 1994); cert. den. _____, N.M. _____, 889 P.2d 203 (1995).

JURISDICTION

The time for filing this Petition was extended by order signed by Mr. Justice Breyer in application number A-772, April 17, 1995, to and until May 25, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101(c) and 2104; and 29 U.S.C. Section 213(b)(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article I, Section 8, Clause 3, provides:

"The Congress shall have the Power . . . To regulate Commerce . . . among the several States . . . "

The United States Constitution, Article VI, Clause 2, provides: "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof, . . . shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

Plaintiff-Respondent Johnsen filed his wage and hour claim under the provisions of the Fair Labor Standards Act of 1938 (the Act), 29 U.S.C. Sections 201 to 219 (1988), in New Mexico District Court for Valencia County.

Both parties filed motions for summary judgment. Undisputed facts show that Employee was a salaried truck driver who traveled extensively over the public highways of New Mexico. The trial court granted Employer's motion and denied that of Employee. (Appendix B)

Employee Johnsen appealed the judgment to the New Mexico Court of Appeals, which held in an Opinion (Appendix A) that the flow of goods was the focus of the exemption, rather than SAFETY of operation of motor

vehicles transporting the goods.

The New Mexico Supreme Court summarily denied Employer's Petition for Writ of Certiorari to review the Opinion of the New Mexico Court of Appeals. (Appendix A)

REASONS FOR GRANTING THE WRIT

The effect of the decision below on interstate commerce would be staggering.

The Opinion departs significantly from the development of Federal caselaw regarding 29 U.S.C. Section 213(b)(1).

The Opinion, as filed, rejects Federal law established by 50 years of precedent.

This decision, already published, would affect all owners of businesses in the country who employ drivers who drive on the public highways. No longer would safety be the primary criterion for interpretation of the overtime exemption to the Act.

Petitioner-employer, Allsup's, has relied for years on the Federal Courts' interpretation of the Act, as applied to its workers.

The Tenth Circuit Court of Appeals feels strongly about its interpretation of the Motor Carrier Exemption to the Act:

". . . It is however, the character of the employee's activities rather than the proportion of either his time or his activities that determines the actual need for the Commission's power to establish qualifications and

maximum hours of service. . . . The Interstate Commerce Commission (now, D.O.T., as correctly noted in the Opinion, f.n.1) is concerned with the maintenance of safety . . ." (emphasis added) Starrett v. Bruce, 391 F.2d 320, 323 (CA10, 1968).

"The court is of the opinion that a majority of the time of the plaintiff was spent in work not directly affecting safety of operation, and is cognizant of the various arguments which would make 'time spent' a governing element. However, under the law, this is not the test. The test is whether or not he had duties which substantially affected safety of operation. He unquestionably did!" (emphasis added) Quinn v. Earl Bray, Inc., 108 F. Supp. 355 (W.D. Okla. 1952). c.f. U.S. v. American Trucking Assoc., 310 U.S. 534, 84 L.Ed 1345, 60 S.Ct. 1059 (1940).

* This is the big problem with the Opinion, as filed. It emphasizes the percentage of involvement with interstate shipping before SAFETY. *

The Opinion has placed the "cart" of commerce before the "horse" of safety. The Act allows for the exemption found by the trial court specifically because federal law recognizes a preemptive interest in safety on the public highways (i.e., the fact that the motor carrier, Allsup's, is engaged in interstate commerce, at all, brings the safety issue into focus, and requires the court to look first at safety, rather than to try determining how much time is spent in interstate, vs. intrastate, commerce.)

Here in the Tenth Circuit of the United States Courts of Appeals, it has recently been held that a company was

exempt under the Act from paying another former employee overtime, based upon Section 29 U.S.C. 213(b)(1). Foxworthy v. Hiland Dairy Co., 997 F.2d 670 (CA10, 1993).

The Oklahoma-based route driver in that case made deliveries entirely within Oklahoma for the Arkansas shipper, another type of convenience store. The receiving customers in that case had agreed to accept specified quantities of dairy product; the employee also returned empty plastic milk cartons.

In that case, the practical continuity of movement across state lines, from point of origin to point of destination, constituted interstate commerce, subject to regulation by the Secretary of Transportation, and thereby exempt from the provision of the Act.

A significant portion of that driver's route included delivery to Circle K convenience stores. The particular products were intended to be delivered to the Circle K stores within Oklahoma from the moment they were loaded onto the truck in Arkansas:

"Pursuant to 29 U.S.C. Section 207(a), an employer must pay overtime compensation at one and one-half times the regular wage, whenever an employee works more than forty hours per week. These requirements do not apply, however, to those employees for whom the Secretary of Transportation has power to establish qualifications and maximum hours. 29 U.S.C. Section 213(b)(1). [This authority, previously vested in the Interstate Commerce Commission, was transferred to the Department of

Transportation in 1983.] An employee of a private motor carrier is subject to the power of the Secretary of Transportation, and therefore exempt from the FLSA, if the employee in the performance of his duties moves goods in interstate commerce and affects the safe operation of motor vehicles on public highways. 49 U.S.C. Section 3102 (other ref.)" Foxworthy, supra, 997 F.2d 670, 672.

If the mere transportation of empty milk crates supports the exemption in Foxworthy (and it does, 997 F.2d @ 674), then the continuity of transport of parts, equipment or fixtures in this case does also.

Morris v. McComb, 332 U.S. 422, 92 L.Ed. 44, 68 S.Ct 131 (1947), cited in the Opinion, was decided after both Levinson v. Spector Motor Serv., 330 U.S. 649, 91 L.Ed. 1158, 67 S.Ct. 931 (1947), and Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 91 L.Ed. 1184, 67 S.Ct. 954 (1947), also cited in the Opinion. In Morris, the Supreme Court reemphasized that it is the character of the employee's activities rather than the proportion of either his time or of his activities that determines the actual need for the Commission's (DOT's) power. Where the duties substantially affect the safety of operation only for a small percentage of the total work time, the Commission was deemed to have power to control (and the exemption of the Act applies).

See discussion in Quinn, supra, 108 F. Supp. 355 @ 357-358:

"Thus, it appears that the question expressly reserved in the Pyramid case has been ruled upon, at least by

implication. . . . where the duties substantially affected safety of operation only for a small percentage of the total work time, the (D.O.T.) was deemed to have power to control."

In our case, Mr. Johnsen clearly drove the public highways of New Mexico almost daily from Gallup to Belen. He was clearly affecting the safety of operations of interstate commerce. Trial Court Finding #12; Conclusion #8:

"Plaintiff's driving a motor vehicle on public highways to transport goods in interstate commerce affected the safety of operations of interstate commerce."

There is no set of facts by which Plaintiff Johnsen can demonstrate that his driving did not affect the safety of operations of interstate commerce, and the trial court so found.

The exemption is concerned with the maintenance of safety. The restrictions on the number of hours which those who engage in interstate commerce on the public highways may work in any one workweek is obviously intended to prevent accidents due to fatigue, without regard to consideration of adequacy of compensation. Shultz v. Kelley, 431 F.2d 1364, 1371 (CA10, 1970).

"As a practical matter it is not the amount of time an employee spends in work affecting safety, rather it is what he may do in the time thus spent, whether it be large or small that determines the effect on safety. Ten minutes of driving by an unqualified driver could do more harm on the highway than a month of driving by a qualified one." Starrett v. Bruce, supra, @ 323.

The correct test for determining whether there is an exemption under Section 213(b)(1) is not simply whether a substantial part of the employee's duties affected the safety of operations, but rather whether any of his duties had a substantial effect on motor vehicle safety. Crooker v. Sexton Motors, Inc., 469 F.2d 206, 209 (CA1, 1972).

"Thus, the emphasis is placed on the effect of the duties on safety of operation rather than the proportion of time spent in doing those duties." Quinn, supra, @ 358.

Once it is determined that Johnsen's weekly driving has a substantial effect on safety on the public highways, the exemption applies regardless of the proportion of the employee's time or of his activities which is actually devoted to such safety-affecting work in a particular workweek. 29 C.F.R. Section 782.2(b)(3).

CONCLUSION

Petitioner-Appellee Allsup's Convenience Stores, Inc., respectfully requests that this Court issue its Writ of Certiorari, directed to the New Mexico Court of Appeals, and reverse the Opinion made by that court in 889 P.2d 853.

RESPECTFULLY SUBMITTED:

William A. L'Esperance
Counsellor at Law
609 Richmond Dr., S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

APPENDIX A

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
(Filed Wednesday, January 25, 1995)

No. 22,596

ROBERT JOHNSEN,
Plaintiff-Respondent,

vs.

ALLSUP'S CONVENIENCE STORES, INC.,
Defendant-Petitioner,

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied.

IT IS FURTHER ORDERED that the Record in Cause No. 15512 is returned to the Clerk of the Court of Appeals.

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO
(Filed October 28, 1994)

No. 15,512

APPEAL FROM THE DISTRICT COURT
OF VALENCIA COUNTY
John W. Pope, District Judge

ROBERT JOHNSEN,
Plaintiff-Appellant,

vs.

ALLSUP'S CONVENIENCE STORE, INC.,
Defendant-Appellee

Leeann Ortiz
Albuquerque, New Mexico — For Plaintiff-Appellant

William A. L'Esperance
Albuquerque, New Mexico — For Defendant-Appellee

OPINION

APODACA, Judge.

Plaintiff Robert Johnsen (Employee) appeals from the trial court's grant of summary judgment in favor of Defendant Allsup's Convenience Stores, Inc. (Employer). Employee's complaint sought unpaid overtime wages pursuant to the Fair Labor Standards Act of 1938 (the Act), 29 U.S.C. Sections 201 to 219 (1988). Summary judgment was granted on the basis that Employer was exempt from paying overtime under the Act and the Motor Carrier Act (MCA), 49 U.S.C. Sections 3102 through 3104 (1988). Employee advances three separate issues on appeal that together raise the essential question we address: Did Employee, in transporting certain parts necessary to repair equipment owned by Employer at its various retail stores located in New Mexico, engage in the transportation of goods in interstate commerce, thus bringing into play the exemption provision of the MCA and the Act, which together exempt such employees from the overtime requirements of the Act?

We conclude that, as a matter of law, Employee engaged in the transportation of intrastate commerce when transporting parts obtained from Employer's warehouse in Clovis. Similarly, we conclude that, as a matter of law, Employee engaged in the transportation of intrastate commerce when transporting parts specially purchased from local wholesalers, when such parts were already in stock at

the wholesaler's places of business in New Mexico. We hold, however, that Employee engaged in the transportation of interstate commerce when transporting parts specially ordered from local wholesalers, when such parts were shipped to those local wholesalers from out-of-state suppliers to fill Employee's special orders. We also hold that a genuine issue of material fact existed concerning to what extent Employee's job entailed transporting parts specially ordered from local wholesalers. Because a genuine issue of material fact existed on such orders, we hold that the trial court erred in granting summary judgment in favor of Employer on that particular question. We therefore reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Employer is a retail business that operated convenience stores in several states. Employee was employed by Employer from July 1989 through October 1991, as the district maintenance person for Employer's Albuquerque district, a district located solely within New Mexico. In such capacity, Employee performed a variety of duties, including the repair, maintenance, and installation of store equipment and fixtures. His duties required him to initiate orders for parts, equipment, and fixtures as necessary to maintain the stores in his district.

To service each store within his district, Employee was assigned a truck owned by Employer, in which he maintained an inventory of parts and supplies. When he needed parts not carried in the truck, Employer's purchasing department would send him the required parts from Employer's supply warehouse in Clovis, New Mexico. If Employer's warehouse did not have the parts in stock, Employee would purchase the parts from local wholesalers using a purchase order number acquired from Employer's purchasing department. If the wholesaler did not have the parts in stock, it would place a special order for the parts, occasionally from out-of-state supplies. Before ordering any parts from wholesalers, Employee was required to designate, on the purchase order form, the specific store for which the parts were ordered. When the parts arrived, Employee would pick them up from the wholesaler and install them in the specific store for which he had ordered them.

While employed by Employer, Employee regularly worked more than forty hours per week. Employer did not, however, compensate Employee at one and one-half his hourly rate for hours worked in excess of a forty-hour work week as required by the Act. See U.S.C. § 206.

Both parties filed motions for summary judgment, arguing that the facts supporting their motions were undisputed. In support of its motion, Employer argued that Employee was exempt from the overtime compensation provisions of the Act, under 29 U.S.C. Section 213(b)(1), because Employee fell within the provisions of the MCA. Employer contended that, because Employee was a truck

driver engaged in interstate commerce, he was subject to the jurisdiction of the Secretary of Transportation under the MCA, thus triggering the exemption under the Act.

In granting Employer's motion and denying Employee's motion, the trial court held that Employee was not entitled to receive overtime compensation because he transported goods in interstate commerce. Although the trial court's ruling was within the context of a summary judgment proceeding, the trial court inappropriately entered findings of fact. Specifically, the trial court found:

> 15. As . . . more that [an] incidental part of his duties, [Employee] did receive parts shipped from outside the State of New Mexico and transported those parts by motor vehicle to their final destination within the State of New Mexico.
>
> . . . .
>
> 17. The parts that had their shipment originate outside the State of New Mexico and that [Employee] transported by motor vehicle to their final destination within the State of New Mexico had their place of final destination in New Mexico designated prior to the origination of their shipping.

> 18. The parts that had their shipment originate to a predesignated final destination within the State of New Mexico constituted goods in interstate commerce.
>
> 19. As . . . more than [an] incidental part of his . . . duties, [Employee] was expected to transport by motor vehicle goods in interstate commerce.
>
> 20. As . . . more than [an] incidental part of his . . . duties, [Employee] transported by motor vehicle goods in interstate commerce; said goods were transported by [Employee] prior to the end of the interstate nature of their transportation.

Based on these findings, the trial court concluded that Employer was exempt from paying overtime compensation to Employee under the Act. The trial court later denied Employee's motion for reconsideration. This appeal followed.

II. DISCUSSION

A. General

Employer is an enterprise engaged in commerce as defined by 29 U.S.C. Sections 203(r) and 203(s) (Supp.IV 1993) of the Act. Thus, Employer's employees are covered by the Act's minimum wage and overtime provisions, unless otherwise exempted. See 29 U.S.C. §§ 206, 207, 213. Section 207(a)(1) contains the foundation for the overtime provisions of the Act. It states:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

These overtime requirements do not apply, however, to employees for "whom the Secretary of Transportation has power to establish qualifications and maximum hours of service" under Section 3102 of the MCA, 49 U.S.C. Section

3102. 29 U.S.C. § 213(b)(1).[1] "Because of the importance of the overtime provisions in fostering the smooth flow of interstate commerce, [an] employer seeking the exemption bears the burden of proving [its] entitlement to it." Sinclair v. Beacon Gasoline Co., 447 F.Supp. 5, 9 (W.D. La 1976) (citing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Brennan v. Bill Kirk's Volkswagen, 497 F.2d 892, 894 (4th Cir. 1974); Brennan v. Greene's Propane Gas Serv., Inc., 479 F.2d 1027, 1032 (5th Cir. 1973)), aff'd, 571 F.2d 978 (5th Cir. 1978).

The purpose of the MCA is to allow the Secretary of Transportation to regulate the safety of motor vehicle travel on the nation's highways. Sinclair, 447 F. Supp. at 9. The Secretary of Transportation's power to regulate under the MCA, however, is limited to those employees whose activities affect the safety of operation of motor vehicles transporting property in interstate commerce. Levinson v. Spector Motor Serv., 330 U.S. 649, 669-70 (1947); United States v. American Trucking Ass'ns, 310 U.S. 534, 553 (1940); see 49 U.S.C. §§ 3102, 10521 (1988). Therefore,

---

[1]"This authority, previously vested in the Interstate Commerce Commission, was transferred to the Department of Transportation in 1983." Foxworthy v. Hiland Dairy Co., 997 F.2d 670, 672 n.2(10th Cir. 1993). Many of the cases we refer to originated before the 1983 change and thus construe the former delegation of authority to the Interstate Commerce Commission. Because this case arose after the 1983 transfer of authority, however, we discuss the applicability of the Motor Carrier Act in the context of the Secretary of Transportation, not the Interstate Commerce Commission.

for Employee to fall within the "motor carrier exemption" provisions of the Act, his duties, or a substantial part of those duties, must have affected the safety of operation of motor vehicles and involved the transportation of property in interstate commerce. See Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 706-09 (1947). Only then would the Secretary of Transportation have the power to regulate Employee under the MCA, thus making him exempt for overtime compensation under the Act.

Here, it is clear that Employee, as part of his duties for Employer, drove a truck on the highways of New Mexico and that he transported parts, equipment, and fixtures in that truck. The question of the Secretary of Transportation's power to prescribe qualifications and maximum hours of service for Employee turns upon the question of whether Employee, whose duties were performed solely within New Mexico, was engaged in transporting property in interstate commerce. Such transportation can be accomplished in one of two ways: (1) by a motor vehicle driven across the state lines; or (2) where a motor vehicle is operated wholly upon the highways of a single state, but the transportation performed is part of a continuous movement originating in or destined to a point in another state. Because Employee did not cross state lines in the performance of his duties for Employers, any interstate transportation of parts by Employee, if it occurred, must therefore be premised on the second method, a continuous movement originating in or destined to a point in another state.

Transportation of parts within a single state may remain "interstate" in character when it forms part of a "practical continuity of movement" across state lines from the point of origin to the point of final destination. Walling v. Jacksonville Paper Co., 317 U.S. 564, 568 (1943); Foxworthy, 997 F.2d at 672. "The characterization of such transportation as interstate or intrastate depends upon the 'essential character' of the shipment." Foxworthy, 997 F.2d at 672 (citing Texas & N.O.R.R. v. Sabine Tram Co., 227 U.S. 111, 122(1913). "'" Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment."'" Id. (quoting International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers v. Interstate Commerce Comm'n, 921 F.2d 904, 908 (9th Cir. 1990) (citation omitted)). There is no fixed and persisting intent to ship goods in interstate commerce where:

> (i) [a]t the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within

> the single State is specifically arranged only after sale or allocation from storage.

29 C.F.R. § 782.7(b)(2) (1993).

B. The Different Shipments

Under the facts in this appeal, two different types of parts or shipments were involved. First, the parts that were shipped from out-of-state suppliers directly to Employer's warehouse in Clovis where they were stored until needed. Second, the parts that were specially ordered from local wholesalers by Employee. We discuss each separately.

1. Parts Shipped to Employer's Warehouses

Applying the test set out in 29 C.F.R. Section 782.7(b)(2), we conclude, as a matter of law, that the parts shipped to Employer's warehouse and stored for future use, as needed, were no longer "interstate in nature" when transported by Employee because the supplier's intent at the time of shipment as to deliver the parts directly to Employer's supply warehouse. It is clear that, when the parts were shipped, Employer's warehouse in Clovis, and not any specific store, was the intended destination of the parts. See 29 C.F.R. § 782.7(b)(2)(i); Walling v. Mutual Wholesale Food & Supply Co., 46 F. Supp. 939, 949 (D.

Minn. 1942). Employer's warehouse was a distribution point from which the parts were allocated to maintenance personnel as needed. See 29 C.F.R. § 782.7(b)(2)ii). Additionally, distribution of the parts to Employer's retail stores was "specifically arranged only after . . . allocation from storage." See 29 C.F.R. § 782.7(b)(2)(iii). But cf. Foxworthy, 997 F.2d 670 (route sales representative taking delivery of goods intended for ultimate delivery to a particular store); Griffin v. Consolidated Foods Corp., 771 F.2d 826 (4th Cir. 1985) (same).

In Beggs v. Kroger Co. 167 F.2d 700, 703 (8th Cir. 1948), the Eighth Circuit concluded that purely intrastate segments of transportation are not part of interstate commerce if the product comes to rest within the state. Questions of "'movement,' cessation of movement, interruption of movement are each factual matters." Kline v. Wirtz, 373 F.2d 281, 282 (5th Cir. 1967). Here, the record indicates that the parts involved clearly came to rest in Employer's warehouse in Clovis. Thus, it necessarily follows that, when Employee transported the parts by truck to Employer's retail stores, he engaged in intrastate, not interstate commerce.

2. Parts Shipped to Wholesalers

When the necessary parts could not be obtained from Employer's Clovis warehouse, Employee would purchase the parts from local wholesalers. If the wholesaler did not have the parts in stock, it would specially order the parts for

Employee, occasionally from out-of-state suppliers. Thus, the parts purchased by Employee from local wholesalers can be divided into two categories: (1) those parts that the wholesaler already had in stock at its place of business in New Mexico; and (2) those parts that the wholesaler did not have in stock and had to specially order from out-of-state suppliers. We discuss each separately.

a. Parts in Stock at Wholesaler's Warehouse

Based on our analysis of "Parts Shipped to Employer's Warehouse," above, we conclude that, as a matter of law, the parts purchased by Employee from local wholesalers, which the wholesaler already had in stock at its place of business in New Mexico, were no longer "interstate in nature" when transported by Employee. Thus, to the extent that Employee transported these parts, Employee engaged in intrastate commerce.

b. Parts Shipped to Wholesaler from Out-of-State Suppliers

Employee also transported parts that he purchased from local wholesalers, which the wholesalers did not have in stock and had to specially order for Employee from out-of-state suppliers. Employee ordered these parts from the local wholesalers with the intent at the time of purchase that the parts would be installed in a specific store. Employer

argues that, because Employee ordered these parts with the definite intention that such parts would be installed in a specific store, they were interstate in character. Employer contends that the parts had a continuity of movement across state lines from their point of origin out of state to their final point of destination in an Employer's retail store. We agree. We conclude that the parts ordered by Employee from local wholesalers, which were shipped to the wholesalers from out-of-state suppliers specifically for Employee, constituted goods in interstate commerce.

Our conclusion is supported by the United States Supreme Court's decision in Jacksonville, 317 U.S. at 568-70. There, the Court sorted deliveries of goods into three categories: (1) those purchased by a wholesaler upon the order of a customer with the definite intention that such goods shall be carried at once to the customer; (2) those obtained by a wholesaler from the manufacturer or supplier to meet the needs of specified customers pursuant to some understanding with the customer, though not for immediate delivery; and (3) those based on anticipation of the needs of specific customers, rather than upon prior orders or contracts. The Court found that goods in the first and second categories remained "in commerce" and their interstate journey ended only when delivered to retail customers. Id. at 568-69. Because the parts purchased by Employee from local wholesalers fall into category one, they remained "in commerce" until delivered to their final destination. It was only through Employee's transportation of these parts that they ultimately reached their final,

intended destination. Consequently, Employee's movement of the specially-ordered parts constituted interstate transportation.

Employee argues, however, that he did not transport parts in interstate commerce because the parts he purchased from local wholesalers had "come to rest" with the wholesalers before he transported them to their designated store. Employee thus contends that he engaged only in intrastate transportation. We are not persuaded. "The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean they are no longer 'in commerce' within the meaning of the Act." Jacksonville, 317 U.S. at 568. Besides, if the halt in the movement of goods is a convenient intermediate step in the process of getting them to their final destination, they remain in commerce until they reach it. Id.

We conclude that the parts Employee ordered from local wholesalers, which the wholesalers did not have in stock and had to specially order from out-of-state suppliers, only temporarily paused in transit when delivered to the wholesaler. The "halt in the movement" of the parts to their final destination, the specific store Employee had ordered the parts for. This is because the specific retail store designated at the time of ordering, and not the wholesaler's warehouse, was the final destination of the parts.

C. Genuine Issue of Material Fact

We have determined thus far that Employee transported both intrastate and interstate goods in commerce. The trial court granted summary judgment in favor of Employer on the basis that Employee transported goods in interstate commerce "[a]s more than [an] incidental part of his duties." Employee argues, however, that his transportation of parts interstate in nature was an insubstantial part of his duties, and therefore falls within the de minimis exception of Pyramid, 330 U.S. 695. If the duties Employee performed relating to safety or interstate commerce were de minimis in relation to his other duties, then the Secretary of Transportation had no power to regulate Employee and the "motor carrier exemption" to the Act is not applicable.

We conclude that a genuine issue of material fact existed concerning what percentage of Employee's duties directly related to interstate commerce and whether such percentage was de minimis in relation to this other duties. See Morris v. McComb, 332 U.S. 422, 423 (1947) (Interstate Commerce Commission had power to establish qualifications and maximum hours of service for drivers when interstate business was from three to four percent of total business and was carried on indiscriminately with intrastate business); Coleman v. Jiffy June Farms, Inc., 324 F. Supp. 664, 669-71 (S.D. Ala. 1970) (interstate activities of drivers were de minimis because each driver averaged only 0.00343 percent of his time in interstate activity), aff'd,

458 F.2d 1139 (5th Cir. 1971), and cert. denied, 409 U.S. 948 (1972). Thus, even though Employee transported goods in interstate commerce, and such transportation may have been a regular part of his duties, he may have performed such transportation only on rare occasions. If Employee transported goods in interstate commerce only on rare occasions, then such interstate transportation may have been only a de minimis part of his duties. It is not clear from the record that the facts on this question were undisputed. In fact, it is not clear that the trial court even addressed this issue. Its resolution should therefore be left to the province of the fact finder. We therefore reverse the grant of summary judgment in favor of Employer, See, Monett v. Dona Ana County Sheriff's Posse, 114 N.M. 452, 454, 840 P.2d 599, 601 (Ct. App. 1992) (summary judgment appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law).

III. CONCLUSION

We hold the trial court erred, as a matter of law, in holding that Employee engaged in interstate commerce when delivering parts obtained from Employer's supply warehouse. We also conclude that the trial court erred, as a matter of law, in holding that Employee engaged in interstate commerce when delivering parts obtained from local wholesalers, when the wholesaler already had the parts in stock. Additionally, we conclude that, with respect to the

parts specially ordered from local wholesalers, when such parts had to be specially ordered from out-of-state suppliers because the wholesaler did not have the parts in stock, a genuine issue of material fact existed on the question of the extent Employee's job entailed transporting those parts. We thus reverse the grant of summary judgment in favor of Employer and remand for further proceedings with this opinion. We award costs to Employee on appeal.

IT IS SO ORDERED.

(s)RUDY S. APODACA, Judge

WE CONCUR:

(s)THOMAS A. DONNELLY, Judge

(s)BENNY E. FLORES, Judge

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO
(Filed December 16, 1994)

No. 15,512

ROBERT JOHNSEN,
Plaintiff-Appellant,

vs.

ALLSUP'S CONVENIENCE STORES, INC.,
Defendant-Appellee

ORDER

In this cause, a motion for rehearing having been filed by the appellee, and consideration having been had by all the member of the original panel,

IT IS ORDERED that the motion for rehearing be **DENIED.**

(s) RUDY S. APODACA, Judge

APPENDIX B

APPENDIX B

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF VALENCIA, STATE OF NEW MEXICO
(Filed December 10, 1993)

No. VA-92-233-CV

ROBERT JOHNSEN,
Plaintiff,

vs.

ALLSUP'S CONVENIENCE STORES, INC.
Defendant.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff Robert Wesley Johnsen, Jr., has been a resident of Valencia County, New Mexico at all times relevant herein.

2. Defendant Allsup's Convenience Stores, Inc. is a business duly incorporated and doing business in the State of New Mexico.

3. Defendant Allsup's Convenience Stores, Inc. is in the retail business and operates convenience stores in several states.

4. Defendant Allsup's Convenience Stores, Inc. is an enterprise engaged in and operates under the enterprise coverage of the Fair Labor Standards Act, 29 U.S.C. Sec. 201, et. seq.

5. Defendant Allsup's Convenience Stores, Inc. transports goods in interstate commerce by motor vehicle.

6. Some of the goods Defendant Allsup's Convenience Stores, Inc. transports are in interstate commerce because they are goods in the continuous transports are in interstate commerce because they are goods in the continuous movement of interstate commerce. (sic)

7. Defendant Allsup's Convenience Stores, Inc. is the owner, lessee or bailee of all goods they transport in interstate commerce.

8. The goods Defendant Allsup's Convenience Stores, Inc. transports in interstate commerce is transported for sale or to further a commercial enterprise.

9. Defendant Allsup's Convenience Stores, Inc. does not contract to transport property or goods of others, does not seek to provide transportation of property or goods of others, and is not available to provide transportation of property or goods of others.

10. Defendant Allsup's Convenience Stores, Inc. has employees transporting goods in interstate commerce who are regulated by the United States Department of Transportation.

11. Plaintiff Robert Wesley Johnsen, Jr. began his employment with Allsup's Convenience Stores, Inc. on or about July 5, 1989.

12. As a more than incidental part of his duties, Plaintiff Robert Wesley Johnsen, Jr. drove a truck on public highways each week he worked for Allsup's Convenience Stores, Inc.

13. As a more than incidental part of his duties, Plaintiff Robert Wesley Johnsen, Jr. transported parts by motor vehicle while he was employed by Defendant Allsup's Convenience Stores, Inc.

14. As a more than incidental part of his duties, Plaintiff was expected to receive parts shipped from outside the State of New Mexico and transport those parts by motor vehicle to their final destination within the State of New Mexico.

15. As a more than incidental part of his duties, Plaintiff did receive parts shipped from outside the State of New Mexico and transported those parts by motor vehicle to their final destination within the State of New Mexico.

16. The parts that were expected to have their shipment originate from outside the State of New Mexico and that Plaintiff was expected to transport to their final destination within the State of New Mexico as a more than incidental part of his duties were expected to have their place of final destination in New Mexico designated prior to their shipment originating.

17. The parts that had their shipment originate outside the State of New Mexico and that Plaintiff

transported by motor vehicle to their final destination within the State of New Mexico had their place of final destination in New Mexico had their place of final destination in New Mexico designated prior to the origination of their shipping. (sic)

18. The parts that had their shipment originate outside the State of New Mexico and that were shipped to a pre-designated final destination within the State of New Mexico constituted goods in interstate commerce.

19. As a more than incidental part of his job duties, Plaintiff was expected to transport by motor vehicle goods in interstate commerce.

20. As a more than incidental part of his job duties, Plaintiff transported by motor vehicle goods in interstate commerce; said goods were transported by Plaintiff prior to the end of the interstate nature of their transportation.

21. Allsup's Convenience Stores, Inc. was the owner, lessee or bailee of the motor vehicle Plaintiff drove and of the goods, including the goods in interstate commerce, that Plaintiff transported as a more than incidental part of his job duties.

22. The goods, including the goods in interstate commerce, that Plaintiff transported by motor vehicle as a more than incidental part of his job duties were transported for sale or to further a commercial enterprise.

23. Allsup's Convenience Stores, Inc. hired Plaintiff in July, 1989 to work a minimum number of hours

per week for Eighteen Hundred Dollars ($1,800.00) per month.

24. Plaintiff was hired to work on a salary basis for Allsup's Convenience Stores, Inc.

25. Plaintiff was a salaried employee throughout his period of employment with Allsup's Convenience Store, Inc.

26. Plaintiff's employment with Allsup's Convenience Store, Inc. ended on or about October 26, 1991.

27. The United States Department of Labor, Employment Standards Administration, Wage and Hour Division, wrote a letter to Plaintiff dated December 3, 1991 notifying Plaintiff as follows concerning his employment with Allsup's [Convenience Store, Inc.] with the following items checked:

. . .

8. Drivers of vehicles transporting goods in interstate commerce are exempt from the overtime requirements under Section 13(b)(1) of the Fair Labor Standards Act. Your employment was exempt under this section of the Fair Labor Standards Act.

. . .

. . .

10. The employer refused to pay for the following reason: 13(b)(1).

. . .

28. Plaintiff filed his Complaint to Recover Overtime Under the Fair Labor Standards Act on June 30, 1992.

29. Each party to this litigation filed a Statement of Undisputed Facts, a motion for Summary Judgment, and a memorandum in Support thereof; and, each party fully responded to the other party's Motion for Summary Judgment.

30. Neither party filed a Statement of Disputed Facts.

31. At the hearing on the Motions for Summary Judgment, Plaintiff abandoned that portion of his Motion for Summary Judgment that pertained to damages.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and over the subject mater of the present litigation.

2. Plaintiff's Complaint seeks to recover overtime pay from the Defendant Allsup's Convenience Store, Inc.

3. There is no dispute of material facts.

4. Defendant Allsup's Convenience Stores, Inc. is subject to the enterprise coverage of the Fair Labor Standards Act, 29 U.S.C. 201, et. seq.

5. Defendant Allsup's Convenience Stores, Inc. is a motor private carrier as defined by the Transportation Code's Motor Carrier Safety Act, 49 U.S.C. Sec. 3101, and

the Transportation Code's Interstate Commerce Act, 49 U.S.C. 10102(13).

6. As a more than incidental part of his duties while employed by Allsup's Convenience Stores, Inc., Plaintiff transported goods in interstate commerce as defined by the Transportation Code's Motor Carrier Safety Act, 49 U.S.C. Sec. 3102, by the Transportation Code's Interstate Commerce Act Sec. 10521, and by the regulations to the Fair Labor Standards Act, 29 C.F.R. Sec. 782.7(b)(1).

7. While employed by Allsup's Convenience Stores, Inc., Plaintiff was a driver of goods in interstate commerce as defined by the regulations to the Fair Labor Standards Act, 29 C.F.R. Sec. 782.3.

8. Plaintiff's driving a motor vehicle on public highways to transport goods in interstate commerce affected the safety of operations of interstate commerce.

9. Pursuant to Sec. 204 of the Motor Carrier Act, 1935 [recodified as 49 U.S.C. Sec. 3102], the Secretary of Transportation had the power to establish qualifications and maximum hours of service for Plaintiff during his employment with Allsup's Convenience Stores, Inc.

10. While employed by Allsup's Convenience Stores, Inc., Plaintiff was exempt under Sec. 13(b)(1) of the Fair Labor Standards Act, 29 U.S.C. Sec. 213(b)(1), from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 207.

11. As a mater of undisputed fact and of law, the Plaintiff is not entitled to overtime pay from the Defendant Allsup's Convenience Stores, Inc.

12. Summary Judgment for Defendant Allsup's Convenience Stores, Inc. and Dismissal of Plaintiff's Complaint with prejudice are appropriate.

(s) JOHN W. POPE, District Judge

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF VALENCIA, STATE OF NEW MEXICO
(Filed December 10, 1993)

No. VA-92-233-CV

ROBERT JOHNSEN,
Plaintiff,

vs.

ALLSUP'S CONVENIENCE STORES, INC.
Defendant.

ORDER OF DISMISSAL

This Court having considered each party's Motion for Summary Judgment and arguments thereon; having reviewed and considered each authority relied upon by the parties in their respective Motions for Summary Judgment; and having entered Findings of Facts and Conclusions of Law,

IT IS HEREBY ORDERED:

1) The Findings of Facts and Conclusions of Law previously entered herein are hereby adopted by this Court;

2) Summary Judgment is granted to the Defendant; and

3) The above-styled cause of action is dismissed with prejudice.

(s) JOHN W. POPE, District Judge

SUBMITTED BY:

(s) CARMAN LAVENDER, Attorney for Defendant

APPROVED BY:

(s) LEEANN ORTIZ, Attorney for Plaintiff

Supreme Court, U.S.
FILED
JUN 21 1995
OFFICE OF THE CLERK

(2)

No. 94-1929

In The

Supreme Court of the United States

October Term, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

v.

ROBERT JOHNSEN,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

BRIEF IN OPPOSITION

LeeAnn Ortiz
Attorney for Respondent
911 2nd Street NW
Albuquerque, New Mexico 87102
(505) 243-7671

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Where nature of employee's duties are that of a maintenance person and do not affect the safety of operation of motor vehicles, is the jurisdiction of the Secretary of Transportation invoked under the Motor Carrier Act, 29 U.S.C. Sections 3102 to 3104 thereby exempting employee from the overtime compensation provisions of the Fair Labor Standards Act, 29 U.S.C. Sections 201 to 219?

PARTIES

All parties are named in the caption.

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49 U.S.C. Section 3102 ..... *passim*

No. 94-1929

In The

Supreme Court of the United States

October Term, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

v.

ROBERT JOHNSEN,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

BRIEF IN OPPOSITION

The Respondent respectfully urges that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

OPINIONS BELOW

There is no need to refer to a summary of the Opinion, as the Opinion appears in full beginning on page A-1 of Appendix A of Petitioner's Petition.

STATEMENT OF THE CASE

Respondent contradicts and supplements the Petitioner's Statement of the case as follows:

Respondent contradicts the statement in the second paragraph that " . . . employee was a salaried truck driver . . . ", as employee was hired at the hourly rate of $8.31 in 1989 as paycheck statements reflect. Employee was employed as a district maintenance person and performed a variety of tasks, including the repair and maintenance of Employer's stores within his district. Incidental to Employee's maintenance responsibilities, he drove from store to store to perform his maintenance duties. Employee was not a salaried truck driver and was primarily engaged in maintaining store equipment and fixtures on behalf of Employer.

In the third paragraph the objection to the Statement is that it incorrectly states that safety is the focus of the Motor Carrier Act (MCA) 49 U.S.C. Section 3102 exemption to the overtime requirements of the Fair Labor Standards Act (the Act). Fair Labor Standards Act 29 U.S.C. Sections 201 to 219 (1988). The New Mexico Court of Appeals correctly stated that the jurisdiction of the Secretary of Transportation is limited to those employees whose activities affect the safety of operation of motor vehicles transporting property in interstate commerce.

In 1989, Employee was hired as maintenance man by Employer and earned $8.31 per hour. Employee performed general maintenance work for Employer's stores located entirely within New Mexico. For two and one-half years, Employee regularly worked in excess of forty

hours per workweek without receiving overtime compensation. Employee received the same amount of pay each week, despite the number of hours he worked.

Employee carried a general inventory of parts and supplies on his service vehicle in order to perform his maintenance duties. The parts may be separated into three separate categories. The first two types of parts were parts obtained from Employer's own warehouse in New Mexico and parts obtained from local wholesalers not affiliated with Employer. The third type of part was generated when the local wholesaler did not have a part in stock and Employee placed a special order which the wholesaler would fill specifically for Employee. The type of part becomes important in analyzing whether Employee engaged in interstate commerce and in determining whether Employee is entitled to overtime compensation.

It is undisputed that Employer falls within the overtime provisions of the Fair Labor Standards Act. The question of fact which remains is whether Employee's duties affected the safety of operation of motor vehicles and involved the transportation of property in interstate commerce.

SUMMARY OF THE ARGUMENT

A genuine issue of material fact exists regarding whether Employee falls outside of the overtime compensation requirements of the Act and within the MCA

exemption. The nature of Employee's duties do not trigger the MCA exemption as Employee did not affect the safety of operation of motor vehicles and was not engaged in interstate commerce. The New Mexico Court of Appeals correctly noted the existence of a genuine issue of material fact and properly reversed the granting of summary judgment and remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

There is no justification for the granting of a Writ in this case as the lower Court followed long-standing federal caselaw, Supreme Court decisions and other Tenth Circuit decisions.

Petitioner states that Employee should be exempt from the overtime provisions of the Act because he drove on interstate highways and thereby affected the safety of operation of motor vehicles. If this type of employment duty triggered the MCA exemption to the Act, then every employee who drives incidental to the performance of his duties would be exempt from receiving overtime compensation.

It is important to understand the dual role of interstate commerce in this case. Employer must be engaged in interstate commerce to fall within the overtime pay requirements of the Act. In contrast, Employee must not be engaged in interstate commerce to fall within the overtime provisions of the Act. While the first threshold of interstate commerce is met by Employer, Employee

does not meet the second threshold of interstate commerce because he did not travel interstate and is entitled to overtime compensation pursuant to the Act.

Employee maintained stores in a district entirely located within the State of New Mexico. This district required Employee to travel *intrastate* to perform his duties. The character of Employee's duties was to maintain Employer's stores within the district and those duties did not require travel across state lines.

It is the character of the employee's activities which determines the need for the Department of Transportation's power to be invoked for purposes of the MCA exemption to apply. *Levinson v. Spector Motor Service,* 330 U.S. 649, 67 S.Ct. 931, 91 L.Ed. 1158 (1946); *Pyramid Motor Freight Corp. v. Ispass,* 330 U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184 (1946); *Morris v. McComb,* 332 U.S. 422, 92 L.Ed. 44, 68 S.Ct. 131 (1947). Employee did not perform mechanical repairs on any of Employer's vehicles and did not have primary or secondary responsibilities for keeping Employer's vehicles in good working order. The character of Employee's duties were that of a maintenance worker which involved general repairs to store fixtures and equipment, not vehicles.

Petitioner cites *Morris,* for the proposition that the MCA exemption was proper where the duties affect safety of operation of motor vehicles only for a small percentage of the total work time. In *Morris,* employer's principal business was the transportation of steel and that of a general cartage service. In contrast, Employer in this case is in the convenience store business and sells a range

of items from food to dish soap. Employer is not primarily engaged in the transportation or cartage business but is principally involved in the convenience store industry.

Also distinguishable is Petitioner's cite to *Foxworthy v. Hilanà Dairy Co.*, 997 F.2d 670 (CA10, 1993). Again, the principal business of employer in that case was that of a delivery service and employee was responsible for making the deliveries. Mr. Johnsen in this case drove within the State of New Mexico to accomplish his duties as a maintenance man and not pursuant to any delivery responsibilities.

Under the *Foxworthy* analysis, the transportation of parts within a single state may still result in interstate commerce and invoke the MCA exemption from overtime. The Opinion states that Employee engaged in *intrastate* commerce for purposes of the MCA exemption when he transported parts received from Employer's own warehouse or from a local wholesaler who had the part in stock. Under those circumstances, Employee is entitled to overtime pay and is not within the MCA exemption. When Employee had to specially order parts, the Opinion states that he was engaged in *interstate* commerce if the part originated from out-of-state suppliers. The conclusion made is that if Employee transported specially ordered parts which originated from out-of-state, then he may be exempt from receiving overtime compensation.

The question which remains is how often, if at all, did Employee engage in interstate commerce by way of transporting specially ordered parts? This is the genuine issue of material fact which precluded summary judgment from being granted and prompted the New Mexico

Court of Appeals to properly reverse the granting of summary judgment.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari as the New Mexico Court of Appeals has properly reversed summary judgment due to the existence of a genuine issue of material fact.

Respectfully submitted,

LeeAnn Ortiz
Attorney for Respondent
911 2nd Street NW
Albuquerque, New Mexico 87102
(505) 243-7671

(3)

No. 94-1929

Supreme Court, U.S.
FILED
AUG 28 1995
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

v.

ROBERT JOHNSEN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

---

PETITIONER'S REPLY BRIEF

WILLIAM A. L'ESPERANCE
Counsel for Petitioner
609 Richmond Drive, S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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No. 94-1929

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

vs.

ROBERT JOHNSEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF NEW MEXICO

PETITIONER'S REPLY BRIEF

The Court should grant the Petition so that the published New Mexico Opinion will not disrupt the Federal Courts by misapplication of the Motor Carrier exemption to the FLSA's overtime provisions for years to come.

The Opinion and Orders are reprinted in full as Appendix A. The Opinion is now published as: Johnsen v. Allsup's Convenience Stores, Inc., 119 N.M. 245, 889 P.2d 853 (Ct.App. 1994); cert. den. 119 N.M. 168, 889 P.2d 203 (1995).

The New Mexico Court of Appeal's Opinion does not reflect the state of the undisputed facts presented to the trial court.

Respondent's first full paragraph (p. 2, Brief in Opposition) is misleading: Mr. Johnsen was never an hourly employee; he was hired as a maintenance person at a salaried rate of $1,800.00 per month.

Employee was salaried, not an hourly wage employee. (Trial Court's Findings of Fact, #23, 24 and 25, Appendix B-5). This is important because but for the Wage & Hour laws, Plaintiff Johnsen would be unable to argue that he is entitled to any compensation except that to which he agreed to be paid. His only remedy is through the application of the Federal Fair Labor Standards Act (FLSA), as pled. 29 U.S.C. § 201, et seq. See especially 29 U.S.C. § 207(a)(1), general overtime provision, set forth in the Answer Brief at p. 6.

The trial court made Findings of Fact based upon submissions by both parties of undisputed facts.

The trial court found as undisputed fact that Allsup's operates under the enterprise coverage of the FLSA; that Allsup's transports goods in interstate commerce by motor vehicle; that some of the goods are in interstate commerce because they are in the continuous movement of interstate commerce; that Allsup's is the owner, lessee or bailee of the motor vehicles and all the goods they transport in interstate commerce; that the goods are transported for sale or to further a commercial enterprise; that Allsup's has employees who are regulated by the U.S. Dept. of Transportation; that Mr. Johnsen drove a truck for Allsup's on the public highways each week, as a more than incidental part of his duties; that Mr. Johnsen received parts shipped from outside the State of New Mexico and transported them to their pre-designated final destination in New Mexico; that Mr. Johnsen was expected to transport goods in interstate commerce; that Mr. Johnsen was a salaried employee throughout his period of employment with Allsup's; and that the U.S. Dept. of Labor, Wage & Hour Division, wrote Mr. Johnsen a letter stating his employment was exempt under Section 13(b)(1) of the Fair Labor Standards Act!

Further, the Wage & Hour expert giving an affidavit for Allsup's, further supported by the Wage & Hour determination, states:

"15. My advice to Allsup's that the maintenance persons are exempt from the Fair Labor Standards Act under Section 13(b)(1) is based on the maintenance persons, as a regular part of their duties, transport parts on the final leg of interstate journeys, i.e., they transport parts and those parts are in the continuous movement of goods in interstate transportation."

The trial court concluded that Allsup's is a "motor private carrier," as the term is defined by the Transportation Code's Motor Carrier Safety Act (MCA), 49 U.S.C. § 3101, et seq.

Pursuant to the MCA, the Secretary of Transportation had the power to establish qualifications and maximum hours of service for Mr. Johnsen during his employment with Allsup's.

So long as the Secretary has the power to establish such qualifications and hours, the FLSA exempts the carrier (Allsup's) from the operation of § 207, supra:

> "The provisions of section 207 of this title shall not apply with respect to--
>
> (1) Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 (recodified as 49 U.S.C. § 3102)." 29 U.S.C. § 213(b)(1). (emphasis added)

By merely saying that the "employee's duties do not affect the safety of operation of motor vehicles," the restated "Question Presented" in the Brief in Opposition (p. i) simply misstates the facts and the law of this case.

It is not necessary that the Secretary actually exercise the power in a particular situation. 49 U.S.C. § 3102. Morris v. McComb, 332 U.S. 422, 92 L.Ed. 44, 68 S.Ct. 131 (1947); Southland Gasoline Co. v. Bayley, 319 U.S. 44, 87 L.Ed. 1244, 63 S.Ct. 917 (1943); Martin v. Coyne Intern. Enterprises Corp., 966 F.2d 61 (CA2, 1992).

In addition, Department of Transportation regulations apply to employees who could have, in the regular course of their employment, been reasonably expected to make one of the carrier's interstate runs. Both the Respondent and the New Mexico appellate courts either failed or refused to address 29 C.F.R. 782.2:

> "In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling."
>
> "As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is . . . called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b2) of this section, he comes within the exemption in all workweeks when he is employed at such job."
>
> 29 C.F.R. § 782.2(b)(2) and (3).

Under the facts of the case, in order to establish the exemption under 29 U.S.C. § 213(b)(1), Allsup's has only to show:

1. Plaintiff's work is covered by the FLSA (pled);
2. Allsup's is a motor carrier (not disputed);
3. Plaintiff was a "driver," (Appendix A-10);
4. Plaintiffs's work while employed at Allsup's affected the safety of operations of interstate transportation; and
5. Plaintiff transported some goods or property which were in interstate commerce.

So, given that items 1, 2 and 3 are met, the emphasis is next on SAFETY:

The employee here, Mr. Johnsen, drove every day of his employment, if not at least during every week, on the public highways. Trial Court Finding #12, Appendix B-3.

The Respondent is incorrect in stating that the Petition refers only to "interstate highways," rather than public highways. (Brief in Opposition, p.4)

The Opinion, to be sure, points out the purpose of the exemption, to allow the Secretary of Transportation to regulate the safety of interstate commerce on public highways (not just interstates). But the emphasis is wrong. Because of the importance of safety, it takes very little interstate commerce to activate the exemption. This is the whole point of Morris v. McComb, supra.

The Opinion (Appendix A) neglects to emphasize that Mr. Johnsen drove an Allsup's leased or owned truck on the public highways each week. Trial Court Finding #12, Appendix B-3.

There is no question of material fact with regard to the safety application of Mr. Johnsen's duties: his driving a truck on the public highways was more than an incidental part of his duties.

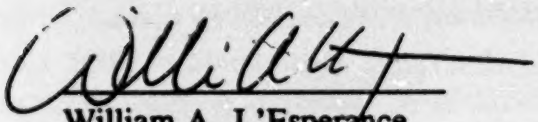
There is no question of material fact with regard to the existence of some interstate activity in Mr. Johnsen's duties: his transporting of goods was more than an incidental part of his duties. Appendix B-7.

The New Mexico Court of Appeals' Opinion, if left as is, by contravening established Federal Law, will fester and severely impact the economy, not only of Petitioner, one of the largest private employers in New Mexico, but of vast numbers of companies doing business in the United States. Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1025 (CA10 1992).

CONCLUSION

The trial court entered Summary Judgment on behalf of Allsup's because it is exempt from the FLSA, as a matter of law. For the reasons stated, the Writ should issue.

RESPECTFULLY SUBMITTED:



William A. L'Esperance
Counsel for Petitioner
609 Richmond Dr. SE
Albuquerque, NM 87106
(505) 266-8482